



HEROLDS BAY HOTEL



## THE RENTAL POOL

### **PARTICIPATION AGREEMENT**

by and between

The Herolds Bay Hotel Pty Ltd  
2008/015182/07

and

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## 1. PARTIES

- 1.1. **The Herolds Bay Hotel Pty Ltd**, Registration Number **2008/015182/07**, hereinafter the “**OPERATOR**”

and

- 1.2. \_\_\_\_\_ (Identity / Registration Number \_\_\_\_\_ )

of:

Address \_\_\_\_\_

Address \_\_\_\_\_

Address \_\_\_\_\_

Address \_\_\_\_\_ hereinafter the “**PARTICIPANT**”

## 2. INTERPRETATION

In this Participation Agreement:

- 2.1. The clause headings are for convenience and shall be disregarded in construing this Participation Agreement;
- 2.2. Unless the context clearly indicates a contrary intention, the singular shall include the plural and vice versa; and a reference to any one gender shall include the other genders; and a reference to natural persons includes legal persons and vice versa;
- 2.3. Words and expressions defined in any sub-clause shall, for the purposes of the clause of which that sub-clause forms part and in subsequent clauses, unless inconsistent with the context, bear the meaning assigned to such words and expressions in that sub-clause;
- 2.4. If any provisions of this Participation Agreement are in conflict or inconsistent with any Law, the invalidity of any such provisions shall not affect the validity of the remainder of the provisions hereof;
- 2.5. If any provision in a definition in this Participation Agreement is a substantive provision conferring rights or imposing obligations on any of the parties hereto, then, notwithstanding that it is only in the definition clause of this Participation Agreement, effect shall be given to it as if it were a substantive provision in the body of this Participation Agreement.

## 3. RECORDAL

The parties record that:

- 3.1. The OPERATOR has been established for the exclusive purpose of creating the Rental Pool and carrying on a Hotel Business at The Herolds Bay
- 3.2. The PARTICIPANT owns Section \_\_\_\_\_, a Unit at The Herolds Bay which the PARTICIPANT makes available to the Hotel Operator for inclusion in the Rental Pool on the terms hereunder
- 3.3. The OPERATOR agrees to include the PARTICIPANT’S Unit in the Rental Pool on the terms hereunder
- 3.4. The OPERATOR will contract with a Management Company for the provision of hospitality management staff, business and administrative management.
- 3.5. This Participation Agreement sets out the rights and obligations of the Parties

#### 4. DEFINITIONS

FF&E	The Furniture Fixtures and Equipment required in the Unit
Operator	The Herolds Bay Hotel Pty Ltd (2008/015182/07)
Rental Pool	The collective of Participating Units contracted to the Operator on the terms of this Agreement
Participant	The Owner of any Unit in The Herolds Bay which is party to a Participation Agreement with the Operator
Participation Agreement	This Agreement
Financial Year	The first day of March to the last day of February
Rental Pool Income (RPI)	The sum of all invoices raised by the Operator in any given month for accommodation and any related services net of VAT
Rental Pool Expenses (RPE)	The sum of all fixed and variable expenses incurred by the Operator in any given month net of VAT
Replacement Reserve (RR)	A fund retained from the Rental Pool Income in an interest bearing account on behalf of the Rental Pool as a provision for repair or replacement of FF&E
Distributable Income (DI)	Rental Pool Income less Rental Pool Expenses less Replacement Reserve (DI = RPI – RPE- RR) in any given month
Participant	The Registered Owner of the Unit
Participants Income (PI)	The Distributable Income multiplied by the Participation Share (PI = DI x PS)
Participation Share (PS)	The factor expressed as a % which is multiplied to the Rental Pool Income or the Rental Pool Expenses or the Distributable Income, to calculate the Participant's share of the Rental Pool Income or the Rental Pool Expenses or the Distributable Income. The factor is the price paid to the Developer for the Unit expressed as a percentage of the sum of the Participating Units prices.
The Herolds Bay	The Sectional Title Scheme registered under SS608/2008 at the Deed Office, Cape Town.
Unit	The apartment, exclusive use areas and undivided share of common property owned by the PARTICIPANT in The Herolds Bay (which includes balconies, storerooms and parking-bays).

#### 5. AGREEMENT

- 5.1. The PARTICIPANT makes available the Unit to the OPERATOR for inclusion in the Rental Pool for the Term of the Agreement
- 5.2. The PARTICIPANT undertakes and agrees to bind it's successors-in-title and/or assigns to the provisions of this Agreement whether in any Deed of Sale or other document in which the PARTICIPANT sells or otherwise alienates the Unit during the Term of the Agreement. Notwithstanding the above, the Participant undertakes not to sell or alienate the Unit other than as provided in Clause 19 below.
- 5.3. The PARTICIPANT irrevocably and *in rem suam*, gives the OPERATOR, in its capacity as Operator and Manager of the Rental Pool and the Hotel Business at The Herolds Bay, thereby possession, all rights, responsibility and authority for the rental and management of the Unit during the Term of the Agreement
- 5.4. The PARTICIPANT hereby irrevocably and *in rem suam* authorises and empowers the OPERATOR (or its nominee or delegate, successor in Title or Assigns) to represent the PARTICIPANT at meetings of the Body Corporate and to vote thereat on behalf of the PARTICIPANT on any and all matters relating to the engagement and operations of the OPERATOR at The Herolds Bay

## 6. OPERATOR'S OBLIGATIONS

- 6.1. The OPERATOR is obliged for the Term of this Agreement to create, manage and administer the Rental Pool and the Hotel Business
- 6.2. Subject to the PARTICIPANT'S right to use the Unit, the OPERATOR will include the Unit in the Rental Pool and will endeavour to rent the Unit to Guests as often as possible in carrying on the Hotel Business
- 6.3. The OPERATOR shall throughout the Term of the Agreement have the right, in its sole discretion, to set the rental rates for the Unit or parts of the Unit, provided such rates are commensurate with comparable South African Rental Pool accommodations or hotels.
- 6.4. For the Term of this Agreement, the OPERATOR is entrusted with the possession, control and management of the Unit and shall be responsible for attending to all matters normally attended to by an owner or manager of such a Unit which include inter alia:
  1. The maintenance of the interior of the Apartment and any exclusive-use area vested in the Unit as required by the Management and Conduct Rules of The Herolds Bay
  2. The maintenance, repair and, if necessary the replacement of the FF&E ensuring that any and all facilities in the Unit are in good working order;
  3. The control of all Guests
  4. Ensuring that there is adequate insurance against fire, theft, damage and such other perils as the OPERATOR deems necessary from time to time providing cover for the contents, the interior of the Unit and Common Property which insurance the OPERATOR is hereby authorised to effect on behalf of the PARTICIPANT from time to time.
- 6.5. The OPERATOR shall, in the management of the Rental Pool and when carrying on the Hotel Business:
  1. Ensure that there is adequate public liability insurance against any claim that might be brought against the PARTICIPANT, the OPERATOR, the Body Corporate, the Management Company or any of the agents or employees of the said entities.
  2. Provide, employ and control all staff as required from time to time and be responsible for the engagement and control of all service providers required in the management and administration of the Rental Pool and the operation of the Hotel Business
  3. Arrange the provision of cleaning services and all Guest supplies and cleaning materials
  4. Arrange the reasonable provision of guest services commensurate with the Hotel Business such as, inter-alia, airport transfers, DSTV and "welcome packs" for Guests checking in
  5. Create and manage a continuing sales and marketing campaign with the objective of ensuring reasonable levels of occupancy in the Hotel Business
  6. Establish an on-line reservation system compatible with GDS networks
  7. Arrange the collection, control and management of the Rental Pool Income
  8. Arrange the punctual payment of all Rental Pool Expenses by deduction from the Rental Pool Income including inter-alia, VAT, Management Company Fees, Auditor's fees and Guests consumption of produce and services
  9. Notwithstanding the obligations and rights above, retain for its discretionary use a Replacement Reserve which will not be more than 3% of the Rental Pool Income but may at the sole discretion of the OPERATOR be less in any period which fund shall be held in an interest bearing account for the benefit of the Rental Pool.
  10. Arrange the punctual monthly reconciliation of the Distributable Income and payment of the PARTICIPANT'S share to the PARTICIPANT.
  11. Maintain books of account in accordance with South African accounting standards and cause the books to be audited annually by the Auditor at the end of each financial year in the Term of the Agreement
  12. Provide a copy of the Audited Accounts annually to the PARTICIPANT

## 7. PARTICIPANT'S OBLIGATIONS

The PARTICIPANT undertakes:

- 7.1. To at all times comply with the Conduct and Management Rules of the Body Corporate.
- 7.2. To comply with the rules of the Rental Pool and the Hotel Business as may be set down from time to time by the OPERATOR which will include, inter-alia, check-in and check-out times
- 7.3. To purchase and pay for the FF&E to be supplied and fitted by Hotel Spec Pty Ltd and as specified in the FF&E Inventory presented by the OPERATOR .
- 7.4. To pay by due date all levies and other charges owing in relation to the Unit and, in the event of the PARTICIPANT failing to make timeous payment, that the OPERATOR be hereby authorised to make such payment by deducting the amounts from the PARTICIPANT'S share of the Distributable Income.
- 7.5. Not to interfere in any way whatsoever with the control and management of the Hotel Business
- 7.6. Not to alter any lock or install any new lock on any doors in the Unit
- 7.7. Not to remove from nor add to the Unit any item from the FF&E inventory nor to change the layout, décor or mix of design
- 7.8. Not to use, occupy, lease or advertise the letting of nor to permit anyone else to use, occupy, lease or advertise the letting of the Unit other than through the OPERATOR else as provided for in this Agreement;
- 7.9. Not to cause or allow its Guests to cause any damage to the Unit or any other Unit, FF&E or Common Property and to make good any such damage or to reimburse the Rental Pool with the cost of making good such damage.
- 7.10. With the exception of 7.3, to require that the PARTICIPANT'S guests agree to abide by the Participant's Obligations set out in 7.1 to 7.7 of this Agreement as though they were the Participant.

## 8. CALCULATION OF DISTRIBUTABLE INCOME AND PARTICIPANT'S INCOME

- 8.1. The OPERATOR will calculate the Distributable Income for each month on or before the last business day of the following month.
- 8.2. The OPERATOR will at the same time calculate the Participants Income which, if positive, will be paid to the PARTICIPANT on or before the last business day of the following month.

## 9. RENTAL POOL EXPENSES

- 9.1. The Management Company will earn a fee calculated as 20% of the Rental Pool Income. The OPERATOR is hereby authorised to deduct this amount from the Rental Pool Income and to pay it to the Management Company.
- 9.2. The PARTICIPANT furthermore authorises the OPERATOR to pay from the Rental Pool Income the Participant's share of fixed and variable costs of the Rental Pool Hotel Business as well as any costs or expenses incurred directly as a consequence of ownership of the Unit.
- 9.3. Notwithstanding reference in clause 7, the Participant hereby authorises the OPERATOR to deduct from the Participants Income any amount which may be due to the Body Corporate whether levies or other amounts.

## 10. REIMBURSEMENT OF DISTRIBUTABLE INCOME

If the Rental Pool Expenses exceed the Rental Pool Income in any given month, the Distributable Income is negative. The PARTICIPANT will be required to immediately reimburse to the OPERATOR the Participants Share of the negative Distributable Income, provided that:

- 10.1. The Management Fee for that month be reduced by 25%
- 10.2. The reimbursement shall not exceed the Rental Pool Fixed Costs

The PARTICIPANT will be in breach of this agreement should it not make the reimbursement within 7 days of a written request for payment from the OPERATOR.

## 11. VAT

Provided that the PARTICIPANT is not itself registered for VAT, the PARTICIPANT hereby authorises the OPERATOR in its capacity as a "Commercial Rental Establishment" to reclaim the VAT on the Unit's purchase price and the FF&E, which is to be paid to the PARTICIPANT. To this end, the PARTICIPANT agrees to timeously provide all information and documentation which may be required by SARS, the OPERATOR or any other authority. The distribution of the Participants Income will thereafter be zero-rated for VAT purposes.

*\*The PARTICIPANT hereby acknowledges and understands that any future sale of the Unit will be subject to VAT, furthermore SARS will require a payment of the VAT reclaimed on the Units purchase price and FF&E in the event of a cancellation or termination of this Agreement.*

## 12. STAMP DUTY

Any stamp duty payable in respect of this Agreement shall be for the account of the PARTICIPANT.

## 13. OWNERS USE

The PARTICIPANT shall be entitled to book and enjoy unrestricted use enjoyment and occupation of the Unit for 21 days each year provided that:

- 13.1. The Owners Use is not taken as more than 14 consecutive days
- 13.2. For any period that the PARTICIPANT occupies reserves or has a Guest at the Unit, the PARTICIPANT shall not have a Share of the Rental Pool Income but shall remain liable for its share of the Rental Pool Expenses.
- 13.3. In addition and inclusive of 13.1, for any period deemed a peak-period by the OPERATOR or the Management Company, the PARTICIPANT agrees to pay a rental fee of 50% of the rack rate.
- 13.4. All such bookings are subject to availability as determined by the OPERATOR which may, in its sole discretion, refuse the PARTICIPANT'S Owners Use in any period if it is of the opinion that such use would materially affect the Rental Pool Income.
- 13.5. Any days not used by the Owners will not be carried over into the following year.

#### **14. REPORTING**

The OPERATOR will provide, monthly, a summary account of Income and Expenditure for the month on or before the last working day of the following month.

The OPERATOR will include in this monthly report a simple Operating Report highlighting performance for the previous month and the outlook for future reservations.

A copy of the Annual Audited Accounts of the OPERATOR will be made available to the PARTICIPANT three months following each financial year-end

#### **15. MINIMUM PARTICIPATING UNITS**

The OPERATOR has committed to invest in the Hotel Business and to provide management and administrative services to the Rental Pool.

The OPERATOR reserves the right to propose amendments to the terms of this Agreement or to declare it null and void without penalty should fewer than 25 PARTICIPANT'S sign Agreements identical to this Agreement prior to 30<sup>th</sup> September 2008 or thereafter should the number of Participants fall below 30 at any time in the Term of the Agreement.

#### **16. PARTICIPATION SHARE**

The Participation Share is unique for each Participant and will initially be confirmed to the Participant at the time of signature of the Agreement. The OPERATOR will confirm in its monthly report each time there is a change in the Participant Share to the Participant which will occur when any Unit is added to or removed from the Rental Pool.

#### **17. PARTICIPATING UNITS**

The Owner of each Unit sold by the Developer will be invited by the OPERATOR to sign a Participation Agreement. Provided that the Minimum Participating Units have been contracted, any Unit which has initially been withheld by its Owner will, on signature of a Participation Agreement at a later date, will be required to pay a late joining fee.

The Developer of The Herolds Bay may enter and withdraw its unsold Units from time to time at its own discretion without penalty but shall be liable for Rental Pool Expenses in accordance with each Unit's then calculated Participation Share as though they were Participants in the Rental Pool.

#### **18. NO CESSION OR ASSIGNMENT**

Neither the OPERATOR nor the PARTICIPANT shall cede, transfer, make over or assign any of their rights conferred or obligations imposed in terms hereof without the prior written consent of the other party.

**19. TERM AND TERMINATION**

This Agreement shall commence on the date when the last of the signatories has signed and shall be valid for 4 years (48 months). The Agreement shall automatically renew unless either party serves notice in writing 6 months prior to the expiry of the Agreement.

Should the Participant elect to sell its Unit, the Participant hereby agrees to ensure that such a sale be:

- 19.1. subject to the terms of this Agreement or
- 19.2. subject to a three months notice in writing to terminate this Agreement followed by conveyancers confirmation of the sale being unconditional in the hands of the Sellers conveyancing lawyer and provided that the termination does not have a material effect on known confirmed reservations
- 19.3. a sale in execution

**20. SOLE CONTRACTUAL RELATIONSHIP**

The Parties hereto acknowledge that this Agreement contains the entire agreement between them and that no other conditions, stipulations, warranties and/or representations whatsoever have been made by any Party or their agents other than as set forth in this Agreement.

No variation of this Agreement shall have binding effect on the Parties unless it be reduced to writing with specific reference to this Agreement and be signed by both Parties.

**21. DOMICILIA AND NOTICES**

- 21.1. The parties choose as their domicilia citandi et executandi for all purposes under this agreement, whether in respect of court process, notices or other documents or communications of whatsoever nature (including the exercise of any option), the following addresses:

1. The Operator:

Attn. Managing Director  
The Herolds Bay Hotel Pty Ltd  
The Oval, 1 Oakdale Road, Claremont, 7700  
Fax No. +27 21 6740519

2. The Participant:

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- 21.2. Any notice or communication required or permitted to be given in terms of this agreement shall be valid and effective only if in writing but it shall be competent to give notice by telefax or e-mail.
- 21.3. Any party may by notice to any other parties change the physical address chosen as its domicilium citandi et executandi vis-à-vis that party to another physical address in the Republic of South Africa or its telefax number or e-mail address, provided that the change shall become effective vis-à-vis that addressee on the 7th business day from the deemed receipt of the notice by the addressee.
- 21.4. Any notice to a party:-
1. sent by prepaid registered post (by airmail if appropriate) in a correctly addressed envelope to it at its domicilium citandi et executandi shall be deemed to have been received on the 7th business day after posting (unless the contrary is proved);
  2. delivered by hand to a responsible person during ordinary business hours at its domicilium citandi et executandi shall be deemed to have been received on the day of delivery; or
  3. Sent by telefax or e-mail to its chosen telefax number or e-mail address shall be deemed to have been received on the date of despatch (unless the contrary is proved).
- 21.5. Notwithstanding anything to the contrary herein contained a written notice or communication actually received by a party shall be an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at its chosen domicilium citandi et executandi.

Signed by the **PARTICIPANT**:

Name

\_\_\_\_\_

Place

\_\_\_\_\_

Date

\_\_\_\_\_

Signature

\_\_\_\_\_

*(or duly authorised representative who warrants his / her authority hereto)*

Signed by the **OPERATOR**:

Name

\_\_\_\_\_

Place

\_\_\_\_\_

Date

\_\_\_\_\_

Signature

\_\_\_\_\_

*For and on behalf of The Herolds Bay Hotel Pty Ltd  
(who warrants his / her authority hereto)*